

PANARON CONTROL SDN BHD**A****v.****CIMB BANK BHD & THIRD PARTY****HIGH COURT SABAH & SARAWAK, BINTULU****B****JOHN KO WAI SENG JC****[SUIT NO: 22-33-2007 (BTU)]****25 APRIL 2012**

BANKING: Banker and customer - Forged cheques - Whether bank wrongfully and negligently honoured forged cheques - Discrepancies found on cheques - Whether obvious - Whether bank should have made enquiries before making payment - Whether bank had any defence under s. 73A Bills of Exchange Act 1949

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The plaintiff's instant suit against the defendant was for reimbursement, together with interest, of RM395,335 which the defendant paid out of the plaintiff's current account in the process of honouring 196 forged cheques presented for payment. The cheques were presented by the plaintiff's manager who had forged the signatures of the plaintiff's directors on the cheques. The chops on the cheques were also different from the plaintiff's official chop. The plaintiff's case was that despite obvious discrepancies in the signatures and the chop, the defendant's officers had approved them for payment without enquiry. The plaintiff said this not only breached the defendant's duty to the plaintiff but the plaintiff also suffered loss and damage caused by the defendant's negligence. By substituting the defendant's genuine bank statements concerning the account with fabricated ones and sending them to the plaintiff's head office, the manager siphoned away the RM395,335 without the plaintiff knowing that anything was amiss over a period of four years and three months until an in-house investigation over the double debiting of a cheque from the plaintiff's current account uncovered the fraud. In denying it had breached any duty to the plaintiff or that it had been negligent, the defendant additionally sought to rely upon s. 73A of the Bills of Exchange Act 1949 ('BEA') to say that even if the cheques were forged, it was entitled to treat them as genuine because the plaintiff had itself knowingly or negligently contributed to the forgeries or the making of the unauthorised signatures by, *inter alia*, employing an unreliable manager, failing to check on its bank statements and reporting any errors found therein and for having an inadequate control system to monitor its cheques and state of the account.

D**E****F****G****H****I**

A Held (allowing claim):

- B** (1) The plaintiff had established, on a balance of probability, that the defendant had, through breach of its duty to the plaintiff and negligence in the conduct of its banking operations and business in relation to the plaintiff's account, wrongfully allowed the payment out of RM395,335 on the 196 forged cheques in contravention of the plaintiff's mandate. The defendant was therefore liable to reimburse the plaintiff for its loss. (paras 36 & 115)
- C** (2) Although the document examiner's evidence could not be given due weight because the specimen signatures of the plaintiff's directors and manager were not tendered in evidence as exhibits, the court found that the plaintiff's exercise in highlighting and proving the discrepancies in the signatures of the directors on the forged cheques clearly showed that on a balance of probability, it was more probable the signatures were forged rather than signed differently.
- D** (3) The defendant failed to establish that it had any defence to the plaintiff's claim under s. 73A of the BEA. (para 149)

E Case(s) referred to:

- Advanced Diagnostic Laboratory v. EON Bank Berhad* (Suit No. 22-33-2007(MR)) (Unreported) (**refd**)
Chairman, Sarawak Housing Developers' Association v. Malayan Banking Bhd [2010] 10 CLJ 56 HC (**refd**)
Formosa Resort Properties Sdn Bhd v. Bank Bumiputera Malaysia Berhad [2007] 1 LNS 686 HC (**refd**)
- F** *Formosa Resort Properties Sdn Bhd v. Bank Bumiputera Malaysia Bhd* [2010] 6 CLJ 530 CA (**refd**)
Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd [2009] 10 CLJ 234 HC (**refd**)
- G** *Malayan Testing Laboratory Sdn Bhd v. Standard Chartered Bank Malaysia Bhd* [2010] 9 CLJ 309 HC (**refd**)
Melewar Apex Sdn Bhd v. Malayan Banking Bhd [2007] 8 CLJ 579 HC (**refd**)
Principal Salute (M) Sdn Bhd v. RHB Bank Bhd [2010] 5 CLJ 819 HC (**refd**)
Proven Development Sdn Bhd v. Hongkong & Shanghai Banking Corp [1998] 5 CLJ 644 HC (**refd**)
- H** *RHB Bank v. L & R Holdings Sdn Bhd & Anor* [2011] 4 CLJ 369 CA (**refd**)
Tai Hing Cotton Mill Ltd v. Liu Chong Bank Ltd & Ors [1985] 2 All ER 947 (**refd**)
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC (**refd**)
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC (**refd**)
- I** *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484 CA (**refd**)

Legislation referred to:

Bills of Exchange Act 1949, ss. 24, 73A

Evidence Act 1950, ss. 45, 51, 65(1)(c)

*For the plaintiff - Musa Dinggat; M/s Musa Dinggat Advocs**For the defendant - Allan Lao (Lidwina Kiew with him); M/s David Allan Sagah & Teng Advocs**Reported by Ashok Kumar***JUDGMENT****John Ko Wai Seng JC:****Introduction***Trial*

[1] The matter was fixed for trial on 15 June 2010 before a judge and by consent of parties before a Judicial Commissioner and concluded on the 11 October 2011 after several days of trial. The following documents were filed and marked for the purposes of the present proceedings:

- (i) BP - Bundle of pleadings;
- (ii) PBOD 1 - Agreed bundle of documents as to authenticity but not to contents;
- (iii) PBOD 2 - Supplementary bundle of documents - Agreed bundle of documents as to authenticity but not to contents;
- (iv) PBOD 3 - Plaintiff's supplementary bundle of documents;
- (v) DBOD - Defendant's bundle of documents; and
- (vi) DSBOD - Defendant's supplementary bundle of documents.

[2] The plaintiff produced six witnesses: PW1 ('Director N'), PW2 ('Director C'), PW3, PW4 ('expert document examiner'), PW5 ('police officer'), and PW6 ('accounts executive').

[3] The defendant's produced 18 witnesses: DW1 ('internal auditor') and DW2 to DW18 ('service counter officers').

[4] The five volumes notes of proceedings are as follows: vol. 1 ('NOP1') and vols. 2, 3, 4 and 5 ('NOP2').

A Facts Of The Case

[5] The plaintiff, a KL registered company had maintained a current account No. 1106-0010193057 ('the account') with the defendant's branch in Bintulu.

B [6] By the plaintiff's company resolution dated 19 May 2001 (exh. PBOD1-9) ('resolution') it was resolved to open a current account with the defendant to be operated by the signatures of the following persons on the following mandate:

C (a) Any two of the following persons for amounts less than RM3,000:

- (i) Director N;
- (ii) Director C; and
- (iii) Manager.

D (b) By both of the following persons for amounts more than RM3,000:

- (i) Director N; and
- (ii) Director C.

E [7] There is no specific mention of usage of the company's rubber stamp chop ('chop') as part of the mandate in the plaintiff's resolution. A rubber stamp chop of the company ('plaintiff's company chop') was nonetheless affixed to the bottom of the plaintiff's resolution with the defendant.

F [8] Based on the plaintiff's resolution the defendant's standard mandate form and signature scanner form with specimen signatures to operate the plaintiff's current account was duly signed by Director N, Director C and the Manager (exhs. D1 (A)-(C) & DSBOD-6).

G [9] In addition it was provided in the mandate forms (exhs. D1 (A)-(C) & DSBOD-6) as is the usual commercial practice for corporate account for the plaintiff's cheques to be rubber stamped with a company chop of the plaintiff. The plaintiff's company chop affixed on the resolution (exh. PBOD1-9) was also affixed on the account application form (exh. DBOD1-1 at p. 2) at the bottom: stamp of company. The mandated company chop was worded thus (exhs. D1 (A)-(C)) ('mandated company chop'):

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Panaron Control Sdn Bhd
Co. No. 471527-V
...
Authorised Signatories

- [10] The manager was responsible for assisting the plaintiff to bank in cheques, collect cheque books and take the instructions of the directors and accounts executive of the plaintiff in order to ensure the smooth running of the plaintiff's business office in Bintulu. **A**
- [11] The basis for the present cause of action against the defendant arose on or around November 2005 when the plaintiff discovered discrepancies within its monthly bank statements. This followed from the plaintiff's own internal investigations which were triggered by a discovery of a cheque which had been debited twice from the plaintiff's current account. The plaintiff was clearly dissatisfied with the defendant's response towards the plaintiff's inquiries on the matter of the plaintiff's discovery of discrepancies as can be seen by the plaintiff's letters in the period May - December 2006. See: exhs. PBOD2 at pp. 169, 170, 171, 172, 173, 174, to 177, 178, 181, 182, 183 and 186. **B**
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- [12] Subsequently upon receipt of the statements of accounts from the defendant (the original statement of accounts) (exhs. DBOD 10 to 70) the plaintiff discovered from the statement of accounts (exhs. PBOD2-1 to 58) with them that two sets of statement of account existed for the same month and it was then that it became clear that for the period May 2002 until August 2006 there had been extensive unauthorised use of the plaintiff's current account by the manager. **D**
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- [13] From the discovery the plaintiff within the month of September 2006 notified the defendant of the unauthorised use of the plaintiff's current account and both Director 1 and Director 2 of the plaintiff lodged police reports to the effect that their signatures had been forged on pieces of the plaintiff's cheques. **F**
- [14] It has been discovered that the mandated company chop of the plaintiff for their cheques also now appears to differ from that of the chops used on the cheques from 14 October 2002 (exhs. PBOD1-12) and from December 2004 (exhs. 138 PBOD1-151). **G**
- [15] The manager in the meantime has absconded and is untraceable.
- [16] In total, 206 pieces of forged cheques had been used by the manager to unlawfully and/or without mandate or authority to debit the plaintiff's account by the defendant for a sum of RM406,335. The 206 pieces of forged cheques are listed and particularised in appendix A of the statement of claim. See: also exhs. PBOD1-12-282. Cheques with forged Director N signatures are listed in exhs. PBOD1-373-376 and cheques with forged Director C signatures are listed in exhs. PBOD1-377-379. **H**
I

- A** [17] It was also discovered that part of the fraud involved one of the cheque request slips (exh. DSBOD1-1) which had requested for “two cheque books” had been altered to the figure “3”. Without checking for any apparent authority for the alteration, the defendant had issued three cheque books to the manager instead of the original authorised request for two cheque books.
- B**

- [18] The plaintiff had conceded in their submission that only 196 of the 206 forged cheques which had been sent for analysis by a government chemist is the subject matter of the plaintiff’s claim. The ten forged cheques with a total value of RM11,000 are cheque numbers
- C** 67041; 67042; 67043; 67044; 67045; 67046; 67047; 67048; 67049 and 6750 will be disregarded. The plaintiff’s liquidated claim is only for the sum of RM395,335 from the 196 forged cheques.

Issues

- D** [19] The plaintiff’s case is plain and simple the signatory and rubber stamp in the 206 pieces of their cheques worth RM406,335 had been forged as they were never signed by Director N and/or Director C nor stamped with the mandated company chop of the plaintiff in accordance with the plaintiff’s mandate to the defendant. (See exhs. DBOD1-9,
- E** D1(A)-(C), DSBOD-6 and DBOD1-1 p. 2) The claim now is for 196 forged cheques with a total value of RM395,335.

[20] The plaintiff in order to succeed has to prove the following namely:

- F** (i) The 196 pieces of cheques were forged (‘forged cheques’);
- (ii) The defendant honoured the forged cheques and drew down or debited the plaintiff’s current account accordingly, and
- (iii) It is then up to the defendant to establish whether or not it has a
- G** defence by relying on s. 73A of the Bills of Exchange Act 1949 (‘BEA’).

[21] Learned counsel for the plaintiff submitted that the plaintiff had adduced sufficient evidence of negligence leading to the forgery as follows:

- H** 1. Forged Cheques
- (i) Forged Cheques
- (a) Fake or Non-Mandated Company Chop

- I** The plaintiff’s mandated company chop specimen on exhs. D1 (A)-(C) differs from the chop used on all the forged cheques in other words a non-mandated chop was applied in the forged cheques.

In the course of the trial it was discovered and the court finds that the mandated company chop specimen is represented thus (from exhs. DBOD1-9, D1(A)-(C), DSBOD-6 and DBOD1-1 p. 2):

A

Panaron Control Sdn Bhd 200

B

Co. No. 471527-V

...

Authorised Signatories

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- From 14 October 2002 to 22 February 2004:

The specimen plaintiff's mandated company chop prints thus: "Panaron Control Sdn Bhd" without full stops after "Sdn" and "Bhd" whereas the chop used on the forged cheques in this period has full stops after the "Sdn Bhd."

D

Panaron Control Sdn. Bhd.

Co. No. 471527-V

...

E

Authorised Signatories

- From 23 February 2004 to 28 August 2006:

The specimen plaintiff's mandated company chop prints thus: "Co. No. 471527-V" (ie, the company number has a hyphen "-" between the figure "7" and the letter "V") whereas the chop used on the forged cheques in this period appear to be a smaller version and prints thus: "Co. No. 471527 V" with no hyphen "-" between the figure "7" and letter "V" and with full stops after the "Sdn Bhd" thus:

F**G**

Panaron Control Sdn. Bhd.

Co. No. 471527 V

...

H

Authorised Signatories

[22] In consequence, the plaintiff now contends that all the forged cheques have not been chopped with the mandatory mandated company chop in accordance to the plaintiff's mandate to the defendant as per exhs. D1 (A)-(C).

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A [23] Learned counsel for the defendant submitted that a company chop is not a signature as envisaged by s. 24 BEA; the chop though not mandated may not be a forged chop and that the court should not consider this issue as it was not pleaded and raised in the statement of claim.

B [24] The court considers the statement of claim though it does not specifically plead in evidence the use of a non-mandated company chop but it is still adequate to raise it as an issue by virtue of the terminology “signatures” used and in particular paras. 14.5-14.6 of the statement of claim as follows:

C 14. By honouring the aforesaid forged cheques and debiting the Plaintiff’s current account, the Defendant had acted in breach of its duty to the Plaintiff and has further been negligent and has thereby caused the Plaintiff to suffer loss and damage. The particulars of the Defendant’s negligence may be stated as follows:

D PARTICULARS OF THE DEFENDANT’S NEGLIGENCE

E 14.1 failing to adequately, if at all, examine and verify the signatures on the aforesaid forged cheques;

F 14.2 failing to take reasonable steps to compare the signatures on the aforesaid forged cheques with the specimen signatures of the Plaintiff’s authorized signatories;

G 14.3 in light of the substantial and/or material and/or obvious differences between the specimen signatures, failing to take reasonable steps to verify whether, the signatures appearing on the 260 forged cheques were genuine by contacting the Plaintiff;

H 14.4 acting on forged and non existent mandates and authority in debiting the Plaintiff’s current account;

I 14.5 failure to maintain a proper system or protocol of examining and/or verifying the authenticity of cheques presented for payment; and

14.6 failure to detect or require proof of authenticity in amendment’s to the Plaintiff’s original mandate for the issuance of fresh cheque books.

I [25] Though paras. 14.1-14.3 of the statement of claim may talk of signatures only, the court would agree and accept that the general acceptance of the application of this term “verify signatures” in banking practice in the case of a company account is not only for the singular

act to verify the signatures as genuine from the mandate but it entails verification of other mandated acts required by the company account holder *viz.* also to check whether the authorised signatory and how many are mandated to authorise the amount to be paid out and lastly whether the mandated company chop is affixed. (See exh. WS-DW18 para. 10. A1: (b) (c) & (d) and A2 (b) (c) & (d)).

A

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[26] In s. 24 of the BEA, the term “signature” can be interpreted to include a mandated rubber stamp chop as constituting part of the signature in order to accommodate localised conditions and practices as will be further dealt with later. Reference is made to the specimen signature cards (exhs. D1(A)-(C)) where the use of the mandated company chop is such that it forms an integral part of the respective signature of Director N and Director C and this incorporation as a “signature” is confirmed by including it as part of the authorised signatures in the signature scanner form (exh. DSBOD-6) by the defendant.

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D

[27] In any event the court finds that the pleadings in the statement of claim do support and brings out the fact in issue that the defendant had acted on a “forged and non existent mandate and authority” through accepting the non-mandated company chop to clear payment of the forged cheques. This is in contravention of the plaintiff’s mandate in the defendant’s standard mandate form (exhs. D1(A)-(C) for operations of company accounts with the provision of a mandated chop requirement affixed therein. The evidence of the use of a non-mandated company chop supports the plaintiff’s next issue that the defendant had failed to maintain a proper system or protocol of examining and/or verifying the authenticity of cheques presented for payment.

E

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[28] Learned counsel for the defendant further submitted that the use of a mandated chop was not mentioned expressly as part of the plaintiff’s resolution (exhs. DBOD1-9) to operate the plaintiff’s account.

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[29] When we look at the resolution submitted to the defendant, we can see the mandated company chop is affixed at the bottom of the resolution. True it’s use is not specifically mentioned in the body of the resolution, the court accepts that it has been incorporated by it being stamped onto the plaintiff’s resolution (exhs. DBOD1-9) as to expressly or implied required as a part of the plaintiff’s signing mandate requirements which the evidence shows was accepted by the defendant.

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[30] There is also nothing in law and by the plaintiff’s resolution to stop all the three authorised persons when opening the account with the defendant in signing the current account application form (exhs. DBOD1-8), being the authorised signatories to operate the account to specify the use of

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- A** the rubber stamp to identify the company as forming part of their signature requirements. The court is of the view in conformity with commercial practice that this enhancement of the security by including an identifying rubber stamp of the company as part of its signature does not contravene the plaintiff's resolution so long as the account is
- B** operated by the specified persons in accordance with the other signature requirements set out in the resolution.

- [31]** This practice of a corporate and unincorporated body's use of a rubber stamp as part of its signature is the accepted banking norm in Asia being a carryover of the ancient days when people sealed their documents with a seal. Today a company's official signature is the common seal normally supported by two signatures from directors and the company secretary. The court takes cognisance that almost if not all banking institutions prefer or require firm and company accounts to be rubber stamped as part of the mandate. This fact is also given
- C** recognizance by the defendant by the provision of a specific place for the rubber chop to be affixed in the defendant's standard account opening and mandate forms for its corporate customers (see exhs. DBOD1-1 p. 2, D1(A)-(C) and DSBOD-6)
- D**

- [32]** The acts of the parties cannot be construed otherwise then that the parties accepted that the mandated company chop requirement is to be complied with by the defendant for clearing all the plaintiff's cheques.
- E**

- [33]** This finding of the court of the requirement of the mandated company chop to authorise clearing of the plaintiff's cheques is fortified by the defendant's own evidence when DW18 and the rest DW2 to DW17 all testified at para. 10A (or thereabouts) (at pp. 3-4 exh. WS-DW18) as follows:
- F**

A1: Procedure for clearing cheques to payee's bank account

- G** (d) In this case, for the cheques by the Plaintiff, I further checked and noted that each cheque was endorsed with the Plaintiff's Company rubber stamp:

A2: Procedure for processing and clearing cheques presented over the counter (encashment of cheques over the counter)

- H** (d) In this case, for the cheques by the Plaintiff, I also similarly checked and noted that each cheque was endorsed with the Plaintiff's company rubber stamp;

- I** **[34]** Lastly learned counsel for the defendant contended that there is evidence to show that the company chops used to affix on the plaintiff's forged cheques is the company's chop and is not a fake or forgery. The

short answer to this is that it is expected that the plaintiff may have other or different chops used in the course of its business but essential to the security for authorising the clearing of the plaintiff's cheques should be the one affixed on the defendant's standard mandate form (exhs. D1(A)-(C)) and signature scanner form (exh. DSBOD-6) for operation of its accounts. Therefore, if any other of the plaintiff's chops in whatever form is affixed not being mandated should be rejected by the defendant on presentation in compliance with the plaintiff's mandate (exhs. D1(A)-(C)). Further, if the plaintiff have exactly similar chops for operation of accounts and for its business then that would be a defence for the defendant in the event of misuse as a failing of the plaintiff's duty of care to the defendant to take care to prevent fraud, that is evidently not the case here, by the material difference shown in the chops available for use.

[35] The court finds that the defendant had acted on a "forged and non-existent mandate and authority" by accepting the non-mandated company chops to clear payment of the forged cheques in contravention of the plaintiff's mandate in the defendant's standard mandate form (exhs. D1(A)-(C)) and signature scanner form (exh. DSBOD-6) for operations of company accounts. By this failing the court can also find that the defendant had failed "to maintain a proper system or protocol of examining and/or verifying the authenticity" to weed out cheques that bear non-mandated company chops.

[36] The court will find that the plaintiff has established on a balance of probability that the defendant had wrongly or negligently allowed the payment out on 196 forged cheques for the amount of RM395,335 based on the two non-mandated chops in contravention of the plaintiff's mandate.

Forged Signature

Expert Witness (PW4) & Report (Exh. PBOD2-159-168)

[37] Both Director N (PW1) and Director C (PW2) have testified that their signatures on the forged cheques had been forged. PW4, an expert document examiner by her report (exh. PBOD2-159-168) ('report'), has confirmed that PW1's signatures were forged and further that the handwriting in all of the forged cheques were the manager's.

[38] PW4's findings in her report were never challenged through cross-examination. The following was the relevant evidence elicited from PW4 (PW4: lines 7-14 p. 76 NOP1):

Q: How did you do your analysis pertaining to the questioned signatures?

- A** **A :** Firstly, I examined all the specimen signatures, and look for the similarities and differences in the characteristics. Then I compared with the questioned signatures. After I will come out with an opinion regarding authorship of the questioned signatures. The draft report will be gone through by my superior before the final report be produced.
- B** **[39]** In her cross-examination PW4 was asked this (PW4: lines 12-14 p. 78 NOP1):
- Q :** Can you explain what are the characteristics of the signatures?
- C** **A :** The initial strokes, the terminal or ending strokes, the slanting, the line quality, the formation of garlands, etc.
- [40]** PW4 testified that, it took her about six months to analyse all the questioned signatures and handwritings and made a finding to the effect that (PBOD2-159-168 and p. 78 NOP1):
- D** (i) 192 cheques with Director N's signature were forged;
 (PW4: lines 5-8 & 17-23 p. 75 NOP1)
- (ii) Director C's signature may have been written by her; and (PW4: lines 1-5 p. 76 NOP1)
- E** (iii) All the questioned handwritings in all of the 203 impugned cheques may have been written by the manager. (PW4: lines 18-23 p. 76 NOP1)
- F** **[41]** Learned counsel for the plaintiff submitted that the defendant must challenge PW4's evidence and the failure of the defendant to attack or challenge the reasons for PW4's conclusions is fatal to the defendant by reference to the *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 where Anuar bin Dato Zainal Abidin J stated:
- G** In the first place, the disputed cheques were referred to Mr. Phan pursuant to two orders of court dated 23rd day of July, 1987 and 28th day of October, 1987 (produced in the court below as Exhibits P29 and P30) 444 which required him to examine the cheques and say whether the signatures upon them were genuine or not. This he did.
- H** Secondly, having examined the Record Of Appeal, we are satisfied that the Respondent had in Mr. Phan's evidence in chief adduced sufficient evidence to support his conclusions. *That being the case, it was up to the appellant to challenge the evidence of Mr. Phan under cross-examination by attacking the reasons for his conclusions. From the record it is apparent that Mr. Phan was subjected to searching and strenuous cross-examination. The learned Judge nevertheless accepted his evidence and we are unable to find*
- I** *any misdirection by the learned judge on this point.* (emphasis added)

[42] On the other hand learned counsel for the defendant had in rebuttal pointed out PW4's evidence was made as an expert opinion evidence as envisaged under s. 45 of the Evidence Act 1950. A

[43] PW4 had testified that the documents used and/or relied on by her in preparing her report and coming to her findings were the 203 forged cheques and 11 cheque book request forms, which were then compared with the specimen signatures of PW1, PW2 and the manager given to her. The 203 original forged cheques were duly tendered and marked as exhibits. However, the said specimen signatures she used were not tendered in evidence. B

[44] It is settled law that the bare opinion of an expert, without cogent data or grounds to support his or her findings, is of no value or use as evidence. See s. 51 of EA: C

51. Grounds of opinion when relevant

Whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant. D

[45] This principle was clearly upheld by the Supreme Court case of *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 at p. 36 para. 7: E

In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting interference by an appellate tribunal. F

[46] On becoming a bare expression of opinion according to Abdul Malik Ishak JCA in *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484: G

The courts have said, time and again, that a bare expression of opinion has no evidentiary value at all (*Sim Ah Song & Anor v. Rex* [1951] 1 493 LNS 83; [1951] MLJ 150; *Lai Yong Koon v. Public Prosecutor* [1962] 1 494 LNS 74; [1962] MLJ 327; and *Public Prosecutor v. Yiau Swee Tung* [1998] 1 LNS 355; [1999] 3 MLJ 353). H

[47] The court agrees with the submission of learned counsel for the defendant that it is essential for the specimen signatures used by PW4 to analyse and compare the questioned signatures with before coming to her conclusions to be properly discovered and tendered as evidence for the consideration of the court. Without them based on the cited I

A authorities, PW4's opinion is rendered as a bare expression of opinion without more, and as such, cannot be given any weight and/or be considered at all.

B [48] Next learned counsel for the defendant submitted that PW4 was hardly cross-examined on her report because it is not for the defendant to prove that the signatures belong to PW1 and/or PW2: *Formosa Resort Properties Sdn Bhd v. Bank Bumiputera Malaysia Bhd* [2010] 6 CLJ 530. The court agrees that the burden is on the plaintiff to prove that the signatures are forged cheques by using PW4's report which would be material to establishing this. On PW4's report becoming a bare expression of opinion there would be no point for the defence to cross-examine PW4 on it as her evidence no longer bear any weight on the issue of forgery before the court.

D [49] Lastly learned counsel for the defendant submitted the failure of PW4 to compare the signature on the forged cheques with the plaintiff's specimen signatures (exhs. "D1(A)-(C)") or the signature scanner form (exh. DSBOD-6) with the defendant makes PW4's report (exh. P1) ineffective and totally unacceptable evidence.

E [50] In *Formosa Resort Properties (supra)* the Court of Appeal had found and held:

F From the notes of proceedings it was obvious that the appellant had failed to compare and contrast the signatures on the cheques, with the signature on the signature specimen card or at worst the signature on the application form. The appellant instead, in order to establish the forgeries, had merely compared the cheques with the 24 other specimen cheques (P73), but never with the signature specimen card.

G ... For some unfathomable reason this was not done. We were therefore satisfied that the appellant's approach to establish the cheques as forged, by making comparison with P73, and by no means conclusive, was a methodology that was totally unacceptable and misguided. **To totally sideline the specimen signature card or the application form was disastrous for the appellant.** (emphasis added)

H [51] A perusal of the report prepared by PW4 shows a list of the specimen signatures of PW1, PW2 and the manager given to PW4 as a basis for her analysis and comparison with the questioned signatures on the forged cheques being letters, invoices and other miscellaneous documents. There is no mention that PW4 compared it with the specimen signature cards (exhs. D1(A)-(C)) and/or the signature

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scanner form (exh. DSBOD-6) containing the sample signatures of the plaintiff's authorised signatories or reason given why she did not. The original copy of the signature scanner form (exh. DSBOD-6), or even the current account application form signed by PW1, PW2 and the manager (exh. DBOD1 at p. 2), which were all signed at the same time as the specimen signature cards (exhs. D1(A)-(C)), should be available from the defendant. The court is left wondering whether this omission was because they were already missing and the defendant was only able to supply a faint photocopy of the specimen signature card of the plaintiff (exhs. D1(A)-(C)) as the reason why PW4 did not use them.

[52] On the above findings, the court will find that the failures by the plaintiff, coupled with the methodology used by PW4 to establish the forged cheques as forged makes her report (exh. PBOD2-159-168) a bare expression of opinion which the court will not give weight to as evidence to support the plaintiff's case for proving forgery of the forged cheques.

Court's Finding On Forged Signatures

[53] The court without the benefit of the PW4's report will stand guided by the case of *Formosa Resort Properties Sdn Bhd v. Bank Bumiputera Malaysia Bhd* [2007] 1 LNS 686 where the trial judge had concluded that there were variations in the signatures of the alleged forged cheques to that of the signatures of the alleged valid cheques. Despite this, the judge was not satisfied that forgery was not proved, and surmised that there was every possibility that the alleged forged signatures were genuine but signed different. This finding was upheld by both the Court of Appeal and the Federal Court.

[54] The court will also consider the approach taken by Harmindar Singh Dhaliwal JC in the case of *Principal Salute (M) Sdn Bhd v. RHB Bank Bhd* [2010] 5 CLJ 819 when he stated (p. 825):

(12) Even upon a cursory examination, it was quite obvious that the signatures were different especially at the end of the forged signature. The true signatures were markedly consistent but were clearly at variance with the forged ones such that it obviated the need for expert evidence.

[55] From both authorities, it is still the court's duty to review the evidence presented by the plaintiff to establish whether the signatures on the forged cheques of Directors N and C were forged or genuine but signed differently.

- A [56] On the standard of proof required, according to *United Asian Bank Bhd* case (*supra*) it was held (p. 37 f):

In our judgment a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities.

B

[57] The evidence of PW1 and PW2 being self-serving is insufficient to the court *per se* in deciding whether their signatures has been forged by the manager and the court will need to look at the signatures of Director N and C.

C

[58] The other relevant fact is that the defendant has been unable to produce the original copy of exhs. D1(A)-(C) which will be dealt with in detail later.

D

[59] Learned counsel for the plaintiff had meticulously and thoroughly gone through in the cross-examination of the counter staff of the defendant, DW2-DW18 and reviewed in comparison with the genuine signatures of Director N and Director C, the discrepancies and variances in their signatures on the forged cheques cleared by them.

E

[60] The evidence elicited from the cross-examination of DW2 to DW18 has a material bearing and impact on the issue of forgery. This can be seen from the approach taken by DW2 (pp. 53-62 NOP) when he had testified to the extent that he would not enquire having now noticed discrepancies (DW2: lines 1414-1423 p. 165 NOP2):

F

Q : After being pointed out the missing parts of Nik's signature. The strokes, the tapering. Would you not now make further enquiries on Nik's signature before approving it?

A : Now, I would enquire.

G

Q : Why, is it because of the differences?
What makes you want to enquire now before approving?

A : I would not enquire even now.

Q : Even after being pointed the differences?

H

A : Yes, I would not enquire.

[61] DW3 testified as to his competency as a staff counter to verify signatures (DW3: lines 1761-1764 p. 180 NOP2):

I

A : To **my untrained eye** at the material time when I approved the cheque, the signatures on both at the authorised signature of the cheque look the same as the specimen signature in the bank.
(emphasis added)

[62] This stand taken on their competency appears to be common in the testimonies of DW2 to DW18 and reflected by DW4 who had testified thus (para. 18Q/A at 2nd para. p. 6 exh. WS-DW4 or thereabout for the other witnesses): **A**

To **my untrained eye**, at the material time when I approved the cheques, the signatures on both at the authorised signature of the cheque and the 'account payee' section of the cheques looked the same as those in the specimen signatures in the Bank's system. ... (emphasis added) **B**

[63] In respect of Director C's signature, DW4 had testified discrepancies in Director C's signature thus (DW4: lines 2053-2076 pp. 193-194): **C**

Q : I refer you to the top signatures in Exh. D-DSBOD-6 whose is this?

A : Clair Sawat Mai @ Anne Mai. **D**

Q : Do you agree with me at the night there are two dots, one at the top and one at the bottom.

A : Yes.

Q : Also the feature that looks like an arrow head at the left is quite sharp. **E**

A : Yes.

Q : I refer you to the original copy of the cheque no. 134863 (Exh. P-Q-60) (shown to witness). **F**

Mr. Lao : I confirm it has been marked as exhibit (lines 109, page 108 NOP Vol. 2).

Q/A : The signatures line are Clair and Altar Roland.

Q : Where's Clair's purported signature there. **G**

A : It's 2nd from the right.

Q : Do you agree with me on the top there is a short stroke instead of a dot as in the specimen.

A : It's a short stroke.

Q : Do you agree with me, the left part - the arrow head is very different from that in the specimen. **H**

In the cheque, the arrow head contains more characteristics that why I say it's very different.

A : Yes, I agree. **I**

A [64] Similar responses were elicited from the rest, DW2 to DW17 when they were questioned on the discrepancies in the signatures of Director C by learned counsel for the plaintiff.

B [65] In respect of Director N's signature, DW18 accepted that there were discrepancies in Director N's signatures when compared with his specimen (DW18: lines 4885-4903 pp. 313-314 NOP2):

P/C : Refer to pages 227, 229, 231, 178, 170, 194, 193, and 200.
Who are the signatories in this cheque?

C DW18 : Nik and Altar Roland.

P/C : Where is Nik's signature?

DW18 : All on the left.

D P/C : I want you look again at Nik signature in page 227, both the two cheques there is no stroke at the bottom of the signature, agree?

DW18 : Agree.

E P/C : The same also to page 231, so Nik's signature also no stroke at the bottom?

DW18 : Yes.

P/C : Look at page 255, No stroke of the bottom of Nik signature?

DW18 : Yes.

F P/C : Look at pages 193 and 194 also no stroke with purported signature.

DW18 : Agree.

G P/C : Do you agree that in Nik's specimen there is a stroke at the bottom, do you agree?

DW18 : Agree.

H [66] Similar responses were elicited from DW2 to DW17 when they were questioned on the discrepancies in the signatures of Director N by learned counsel for the plaintiff.

I [67] In respect of the plaintiff's mandated company chop, DW18 had testified to the omission of the dash in the chop used on the forged cheque yet he testified thus (DW18: lines 4904-4919 pp. 314-315 NOP2):

P/C : Look at this cheques again pages 174, 227, 229, 231, 255, 178, 170, 194, 193, and 200 and look at their company's number between figure 7 and alphabet V, there is no dash (-) there in this cheque, do you agree? **A**

DW18 : Agree there is no dash.

P/C : Look at Exh. D1(A) and D1(B) and look at company's number there is a dash (-) between figure 7 and Alphabet V, agree? **B**

DW18 : Yes.

P/C : So you agree with me that make the specimen chop different from those cheque that you cleared. **C**

DW18 : It looks the same.

[68] On this, DW2 to DW18 had all testified confidently that they did verify the cheques are endorsed with the plaintiff's mandated company chop and appears to be satisfied with their verification. (DW18: at para. 10A exh. WS-DW18 (or thereabout for the other exhibits)). **D**

[69] The court now finds discrepancies in the chops used in the forged cheques. There is not only a missing hyphen after the "Co. No." in one of the chop but in both chops used on the forged cheques, the "Sdn Bhd" should not have full stops after the abbreviations. The court concludes that the failure to simply spot the continuous use of two non-mandated chops between May 2002 to August 2006 to validate the forged cheques immediately calls into question and affects all their competency of DW2 to DW18 to verify personal signatures to spot forgeries that is an even more complicated task when compared to a straightforward verification of an unvarying rubber stamp chop. **E**
F

[70] Learned counsel for the plaintiff first submitted that a cursory comparison between Director N's forged signatures and her specimen signature (exh. D1(A)) would corroborate PW4's finding. The comparison would reveal their obvious differences especially the strokes at the bottom (or rather the missing strokes in the forged signatures) and the misplaced dots/strokes at the top right. It can be clearly seen that Director N's specimen signature has two distinct characteristics in the form of two cone shaped features pointing upwards and it has a clear stroke at the bottom and a small stroke at the top right. In the forged cheques they are obviously different (exh. PBOD1-14; 17; 19; 20; 24; 27; 29; 31; 34; 37; 40; 41; 42; 43; 45; 46; 47; 48 and 50) as they contain extra characteristics, among others in the form of having straight lines pointing upward. There are no strokes at the bottom and **G**
H
I

A the stroke at the top is clearly misplaced. A careful and competent observation and examination of Director N's purported signatures would have revealed they were forgeries.

B [71] Learned counsel for the plaintiff then submitted that even though PW4 testified that the signature of Director C may not be a forgery nonetheless Director C had denied signing them. Further upon a cursory examination of and comparison with Director C's specimen signature, her purported signatures on the cheques were different. Director C's purported signatures on the left side of the authorised signatory column in the forged cheques (exhs. PBOD1-259; 262; 265; 268; 271; 274; 277; 280; 283 and 287) are obviously different from her specimen signature (exh. D1(B)) which looked rippled and very simple.

D [72] According to learned counsel for the plaintiff, the distinguishing characteristics of Director C's specimen signature in exh. D1(B) are the distinct two dots towards the right end of the line and the neat arrowhead pointing to the left end of the signature. Director C's purported signature in the forged cheque (exh. PBOD1-280) is obviously different from her specimen signature. There are two lines there instead of one and there is only one dot. The arrowhead on the left looks very messy. The same goes to the forged cheque at exh. PBOD1-277. It is obviously different from her specimen signature. The forged cheques at exhs. PBOD1-274, 271 and 268 are even more obviously different from her specimen signature. The same goes to the rest of Director C's purported signatures. They are obviously different from her specimen signature even by a cursory examination of a non-expert.

F [73] Learned counsel for the defendant had submitted that a cursory examination and comparison of Director N's signatures in the forged cheques with other undisputed documents bearing her signature also show similar slight variations in her signature. In fact, the defendant's witnesses were asked to make this comparison at the trial, and it was agreed that slight variations occurred even when comparing Director N's signatures in these undisputed documents - that there are dots where there are supposed to be strokes, that the signature does not taper from left to right, the location and numbers of the strokes or dots. This comparison of undisputed signatures shows exactly that no signatures by one person are identical. There can and always will be slight variations in a person's signature, and such differences clearly do not amount to forgery being proven on a balance of probabilities.

H [74] The court has therefore done a cursory checking on the signatures on the forged cheques and agrees with the submission of the learned counsel for the plaintiff in respect of material variance and

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discrepancies as thoroughly highlighted in the plaintiff's submission and from the evidence from the cross-examination of DW2 to DW18 in the notes of proceedings, a sampling of which are set out earlier.

[75] This is not the usual case that it had been signed differently by Director N and Director C as envisaged by the *Formosa Resort Properties* case (*supra*) but rather that there are subtle and obvious differences and discrepancies that are at variance from the norm even from the layman's point of view. These differences and variances in all the forged cheques noted on them and now admitted to by DW2 to DW18 during cross-examination should have put these banking counter staff on guard. The court finds that it is their duty on such a discovery to raise a query to the signatory whether she signed the cheque and not to the other signatory before them in whose favour the cheque was to be paid to. This is akin to asking the wolf whether it is alright to release the sheep to his custody. This appears not to have been done at all for all 206 forged cheques to the detriment of the plaintiff.

[76] It is a judgmental call made by DW2 to DW18 which is part of their job and claiming to be untrained for the job to verify signatures is no excuse to be lax or negligent in spotting the discrepancies in the signatures before them. This is different from imposing the standard of an expert on them to ferret out good forgeries, which is not the case here as DW2 to DW18 admitted under cross-examination that there were obvious differences and discrepancies to be found in the signatures they had cleared as good. The court finds that the failure of the defendant's counter staff to check with the signatory on discovery of the obvious variations and discrepancies in the signatures of Director N and Director C has allowed the forged cheques to be cleared.

[77] Yet with these highlighted discrepancies in the signatures, DW2 to DW18 proceeded to cash or clear the forged cheques all favouring the manager without question despite what was stated in the case of *Malayan Testing Laboratory Sdn Bhd v. Standard Chartered Bank Malaysia Bhd* [2010] 9 CLJ 309 where Mohd Amin Firdaus JC had occasion to comment (p. 323I):

[82] It is noteworthy to say that the frequency of the fraudulent transactions and in some cases involving huge amount all payable to the same person ought to have put the Defendant bank on alert that something was not right and goaded it on to contact PW1.

[78] When DW1 was cross examined on the frequent encashment of plaintiff's cheques and presentation for payment in his own favour of the plaintiff's cheques she as an internal auditor had answered that these frequent transactions of plaintiff's cheques by the manager in his own favour were not a red flag for suspicion by the defendant.

- A [79] The court finds that the plaintiff's exercise in highlighting and proving the discrepancies in the signatures of Director N and Director C in the forged cheques clearly showed that it is more probable that the signatures were forged rather than signed differently on a balance of probability.
- B [80] Since the court has found without the benefit of expert evidence that the signatures are forged, in the case of *Malayan Testing Laboratory Sdn Bhd (supra)* Mohd Amin Firdaus JC had observed:
- C The evidence of the government document examiner (PW3) confirms that the 32 cheques had been altered. *As SCB did not call its own expert to challenge the evidence of PW3, the court must act on his evidence unless the court finds that it is not convincing. Dr Lo Sook Ling Adela v. Au Mei Yui Christina & Anor* [2002] 1 SLR 408 and *Saeng Un Udom v. PP* [2001] 3 SLR 1. (emphasis added)
- D [81] Therefore the evidential burden shifts to the defendant to produce its own expert to assist the court to find otherwise and they have chosen not to do so.
- E [82] The court will find even if PW4's evidence is not given due weight, following the *Principal Salute* case (*supra*) based on a layman's review of the signatures on the forged cheques and from the cross-examination of DW2 to DW18 that the signatures of Director N and Director C on the forged cheques on a balance of probability were forged.
- F **Tampered And Missing Cheque Request Slips And Missing Signature Mandate Cards**
- G [83] Learned counsel for the plaintiff pointed out the general evidence of negligence on the part of the defendant which had facilitated the manager to issue the forged cheques as follows:
- G *Tampered Cheque Request Slip*
- H [84] The court finds that a cheque book request slip (exh. DSBOD-1) had been amended to read as "3" from the original "2" without any signing onto the amendment to authorise it.
- H [85] Learned counsel for the defendant submitted that it is erroneous for the plaintiff to allude that the defendant was negligent in approving the plaintiff's amended cheque book requisition slip (exh. DSBOD-1) because nowhere in the plaintiff's mandate given to the defendant (through its resolution (exh. DBOD1-(9)) does it state that the plaintiff
- I could only request for two cheque books at any one time.

[86] With respect, the issue here is not how many new cheque books is authorised by the resolution to be requisitioned but rather the application of the established banking practice backed up by the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3) that all amendments or alterations on banking documents like the cheque book request slip must be signed at all times by the authorised signatories in accordance with the mandate without fail to re-validate them. **A**
B

[87] On this DW1 had confirmed the procedure that if there is alteration on the cheque book requisition slip, the attending officer need to confirm the details with the authorised signatory of the account (DW1: lines 687-689 p. 133 NOP2). This request slip (exh. DSOB-1) was approved by DW11 despite the presence of an amendment in it. Another officer of the defendant, DW9 had testified unequivocally testified that it should have been rejected (DW9: lines 3794-3830 pp. 269-271 NOP2). **C**
D

Put : The original number of cheque book requested which was amended to figure 3, do you agree?

A : Yes.

Q : So when there is an amendment, there should have signatures of the authorized signatures on the amendment, do you agree. **E**

A : Yes.

Q : There are no such authorized signatories on this amendment, do you agree? **F**

A : Yes.

Q : So this request should have been rejected? Do you agree?

A : Yes. **G**

[88] This acceptance of the unauthorised amendment to the cheque slip by the defendant had allowed an unauthorised third cheque book to be issued by the defendant to the manager to enable him to commit forgery and effect unauthorised drawings on the plaintiff's account. This is evidence of the defendant's breach and negligence towards operational procedures which has facilitated the forgery to take place. **H**

Missing Cheque Request Slips For The Forged Cheques

[89] Other than one slip (exh. DSBOD-1) the rest of the cheque book request slips according to the defendant are not traceable (exh. PBOD3-1) and destroyed (exh. PBOD2-198). The court finds **I**

A that the series of cheque request slips evidencing the plaintiffs' request for the eight unauthorised cheque books which contained the 206 pieces of forged cheques (see appendix A of statement of claim) was never completely produced by the defendant.

B [90] Learned counsel for the plaintiff submitted that it is the plaintiff's practice to apply for two cheque books at a time and had these missing cheque book slips for the eight unauthorised cheque books been made available it would similarly show the same unauthorised tampering like exh. DSBOD-1 to enable the manager to get hold of the extra eight unauthorised cheque books from the defendant.

C [91] The court considers that it is the duty of the defendant as a banker to keep banking documentations for a certain fixed period before its destruction; therefore if they have to keep and make available the forged cheques which they have, then this very same duty applies for the rest of the cheque book request slips for the eight unauthorised cheque books which had contained the forged cheques. This makes the court question whether their premature destruction before that of the contemporary forged cheques was done in good faith.

D [92] The court will find and make an adverse finding on a balance of probability that on the defendant's failure to produce the rest of the eight unauthorised cheque book request slips that if produced they would like exh. DSBOD-1 show similar unauthorised tampering by the manager to enable him to get the eight unauthorised extra cheque books. This forms part of the evidence of the defendant's breach and negligence towards operational procedures that had contributed to the plaintiff's loss.

Missing Signature Mandate Cards & Clarity Of Director N's Signature

E [93] Only photocopies of specimen signatures of the plaintiff's authorised signatories were tendered as exhs. D1(A)-(C). The originals of these documents were not produced as explained by DW13 (DW13: lines 4425-4447) as not traceable.

F [94] Learned counsel for the plaintiff had submitted that losing such important banking documents shows the breach and negligence on the defendant's part.

G [95] Learned counsel for the defendant contended since the plaintiff's counsel had not objected to the photocopies of specimen signatures of the plaintiff's authorised signatories (exhs. D1(A)-(C)) being tendered as evidence pursuant to s. 65(1)(c) Evidence Act 1950. Once tendered, the court has correctly held that it is admissible evidence and that the originals of exhs. D1(A)-(C) existed at the material time.

[96] With respect, the issue before the court is not whether there exists specimen signatures as evidenced by exhs. D1(A)-(C) but when the originals of exhs. D1(A)-(C) went missing including the aspersion cast on the breach and negligence on the defendant's part in allowing such a set of important document crucial to its banking operations to be misplaced or lost.

A

B

[97] We do not know when the defendant lost the originals. Did they lose it when the forgery was first perpetrated? Therefore, if the defendant's staff was only using the photocopy of the specimen signatures exhs. D1(A)-(C) as their comparisons all these while, then there is little wonder that DW2 to DW18 could not detect the forgeries from the faint photocopies as evidenced by exhs. D1(A)-(C). It is the case of one negligent act of losing the originals that is compounded by the negligence in using the faint photocopies to vet the signatures thereby reducing the ability of the banking counter staff to spot forgeries. This is evidence of the defendant's breach and negligence in its operational procedures to deter forgery.

C

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[98] Further the court agrees with the contention of learned counsel for the plaintiff that the acceptance of the Director N's signature in his specimen card. (exh. D1(A)) had facilitated the forgery to take place. His signature had been over stamped with and covered by the company's mandated chop. With this distractive overlap, it makes it difficult to perceive and ascertain the signature strokes. The defendant should have rejected it and requested for it to be replaced and this clearly reflects the defendant's breach and negligence towards operational procedures to deter forgery.

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[99] It is for the defendant to satisfy the court that the originals of exhs. D1(A)-(C) only went missing after the investigation took place and the defendant has failed to produce cogent evidence to this effect that it was not lost during the period when the forged cheques were being cashed or cleared. The court can only conclude in the face of the overwhelming evidence of breach and negligence disclosed in the staff counter operation of the defendant that it is probable that the originals were misplaced and a photocopy version used by DW2-DW18 over the period they were cashing and clearing the forged cheques.

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Court's Finding On Forged Cheques

[100] The breach and negligence of the defendant had allowed the manager to have access to the 206 pieces of cheques from the eight unauthorised cheque books (from appendix A of statement of claim). The result of which as DW1 had testified that from her internal audit

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A based on the fabricated bank statement of accounts with the plaintiff (exh. PBOD2-1 to 58) and the defendant's own genuine bank statements (exh. DBOD 10 to 70) (DW1: exh. WS-DW1 at p. 3) she found:

B 9A: Upon reconciling the said statements against the records of the Defendant, I noted that there were discrepancies in the deposits and withdrawals transactions reflected in the said statements. I confirmed that all 203 cheques being disputed by the Customer/ Plaintiff were not reflected in the statements of account provided by the Plaintiff (hereinafter referred as "the fabricated statements"). In total, I discovered that the deposits made into the Plaintiff's account differed by RM252,043.20. ...

D [101] The court finds that as a result of the breach and negligence of the defendant in the conduct of its banking operations and business relating to the plaintiff's bank account, the defendant had wrongly and negligently allowed the manager to have possession of eight unauthorised cheque books to commit forgery through the issue of the forged cheques to be used for draw down on the plaintiff's bank account. The manager's use of the scheme of eight unauthorised cheque books and the fabricated bank statements which excluded the unauthorised forged cheques fortifies the court's finding that in all probability that the 206 pieces of forged cheques all bore forged signatures of Directors N and C.

F [102] Added to this is the other relevant fact that the defendant has been unable to produce the original copy of exhs. D1(A)-(C) and this led the court to adversely conclude that there is every probability that the defendant's staff must have been using a photostat copy to verify the specimen signatures at the banking counter rather than relying on the original to clear the plaintiff's cheques whether genuine or forged. This had allowed the forged cheques to be cleared without proper authentication from the original signed specimen cards.

G [103] In *Formosa Resort Properties* case (*supra*) Suriyadi Halim Omar JCA had even accepted (at para. 20 p. 540 C):

It is not uncommon in certain circumstances that the odd forged cheques may slip the sharp eyes of bank officers as in this case, resulting in losses.

H and in *Advanced Diagnostic Laboratory v. EON Bank Berhad* (Miri High Court Suit No. 22-33-2007(MR) (unreported)) Dato Zulkifli bin Bakar J had occasion to comment:

I There is no requirement of the law that the bank officers performing such duties are to be qualified document examiners or a chemist or an expert in handwriting of signatures. It is beyond any stretch of imagination if all the bank tellers must be an expert before he could

verify that the signatures in every cheque presented for encashment does not contain a forged signature. If that is the case, then all the banks in the world and in Malaysia will have to employ an expert document examiner as a bank teller.

A

[104] However from the cross-examination of the defence witnesses DW2-DW18, it appears to the court that it is the lack of bank officers with sharp eyes and front counter staff who ignored variations and discrepancies that had allowed the high volume of forged cheques to be cleared. The court accepts that even if such front counter staff are not trained expert document examiner, they must nonetheless being held out for such a job have some degree of training for the task and professionalism in being responsible for their judgmental call in verifying signatures as genuine especially an unvarying mandated rubber stamp.

B

C

[105] By the volume of the forged cheques here, the court can only but conclude that DW2-DW18 were totally inept in the performance of their duties of verifying the signatures and the mandated chop to be used. They had cleared the forged cheques in the face of the variations and discrepancies in the forged signatures and the non-mandated chops as highlighted in cross-examination and admitted by them. It has become a case where because of the sheer volume involved that the forged signatures and non-mandated chops are being identified and become the genuine ones by DW2-DW19! Their failure to question and to take further instruction and confirmation from the signatory when faced with such discrepancies by saying in their “untrained” or layman’s eye the forged signatures and the non-mandated chops look the same to them is not excusable when it is their job to spot forgeries.

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[106] In consequence of this the court finds that the forged cheques had borne non-mandated chops and that all the signatures of Director N were forged. There may be a possibility that not all Director C’s signatures are forged but on a balance of probability the court will find in the light of Director C’s denial that is unrebutted that her signature were all forged.

G

[107] Under s. 24 BEA, the forged cheques not being all signed by Director N and signed by Director C, and lastly not duly affixed with the company’s mandated chop as part of the signature, the respective forged or unauthorised signature is wholly inoperative to validate the forged cheques. That being the case, the defendant had no authority to act upon them to draw and debit the plaintiff’s bank account with the defendant for any of the forged cheques sent for cashing or clearing.

H

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- A [108] The court will find that the forged cheques were therefore not duly authorised and mandated by the plaintiff to be drawn from the plaintiff's bank account with the defendant.

Honouring Cheques

- B [109] On the matter of whether the defendant honoured the forged cheques, it is not disputed that the defendant had honoured 196 pieces of forged cheques in the total sum of RM395,335 drawn on the plaintiff's bank account with the defendant.

- C [110] In *Tai Hing Cotton Mill Ltd v. Liu Chong Bank Ltd & Ors* [1985] 2 All ER 947, the Privy Council held that a banker who pays on a customer's forged cheques is absolutely liable to the customer. A customer's duty is limited to a duty to refrain from drawing a cheque in such manner as to facilitate fraud or forgery and a duty to inform the bank of any unauthorised cheques purportedly drawn on the account as soon as he becomes aware of it.

- D [111] Learned counsel for the plaintiff had cited the case of *United Asian Bank Berhad (supra)* which established the principle that the liability of a bank for making payments on forged instruments of its customer is founded on the tort of conversion.

- E [112] In *Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* [2009] 10 CLJ 234, Mary Lim JC (at para. 35 p. 245) found that the existence of the contract relating to the account is not in dispute and would construe the resolution as an express term or mandate for the signing of the cheques to be complied with.

- F [113] The plaintiff's cause of action in contract is embodied in para. 10 of the plaintiff's statement of claim that "the defendant has unlawfully and/or without mandate and authority and/or breach of its legal and contractual duty to the plaintiff debited" from the plaintiff's current account by honouring the forged cheques. The breach of the mandate is a breach of the contract for account. (See *Proven Development Sdn Bhd v. Hongkong & Shanghai Banking Corp* [1998] 5 CLJ 644).

- G [114] Learned counsel for the plaintiff submitted that the plaintiff has established on a balance of probability the liability of the defendant to be responsible for the breach and to reimburse the plaintiff for the loss caused to the plaintiff for honouring the forged cheques for the value of RM395,335.

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[115] The court also finds that the defendant had through its breach and negligence in the conduct of its banking operations and business relating to the plaintiff's bank account, wrongfully honoured the 196 pieces of forged cheques in the total sum of RM395,335 from the plaintiff's account with the defendant. In allowing such unauthorised and wrongful draw down from the plaintiff's account with the forged cheques the defendant is liable to reimburse the plaintiff for the loss caused to the plaintiff in the sum of RM395,355.

Defendant's Defence: Section 73A Of The Bills Of Exchange Act 1949

[116] Learned counsel for the defendant contends that s. 73A BEA gives protection to the defendant herein against paying on cheques which contain forged or unauthorised drawers' signatures. Section 73A of the BEA states:

Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be **knowingly or negligently contributes to the forgery** or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value. (emphasis added)

[117] It is the defendant's contention that the plaintiff as drawer had 'knowingly or negligently' contributed to the forgery or the making of the unauthorised signature and as such the defendant may treat such forged cheques as being properly signed or authorised by the plaintiff.

[118] Learned counsel for the plaintiff contended the burden to prove that the plaintiff as drawer had 'knowingly or negligently' contributed to the forgery or the making of the unauthorised signature is upon the defendant.

[119] In *Melewar Apex Sdn Bhd v. Malayan Banking Bhd* [2007] 8 CLJ 579 at Abdul Wahab Patail J (as he then was) at p. 587 H-588B had held:

[35] A close perusal of s. 73A shows that the burden is upon the bank to prove the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorized signature.

[36] It is clear that s. 73A was not a complete but was a qualified reversal of the previous law, placing the burden upon the bank to prove that the drawer:

(a) had acted knowingly or negligently; and

A (b) thereby contributed

(i) to the forgery; or

(ii) the making of the unauthorized signature.

B [120] Learned counsel for the plaintiff also submitted that there is no evidence of any negligence on the part of the plaintiff nor was it seriously contended by the defendant that the plaintiff had knowingly contributed to the forgery or the making of the unauthorised signatures on the forged cheques.

C [121] The court will now deal with the issues raised by the defence on contributory negligence:

Employment Of Manager

D [122] The evidence of the plaintiff shows that in their Bintulu office they had employed the manager as its Sales and Project Manager. The plaintiff's officers from Kuala Lumpur supervised him and frequently came to Bintulu as Director C especially, maintains an address in Bintulu. Being a small company and with the advent of modern communication namely email and telephones, the plaintiff's management set up was sufficient to supervise the manager and there was nothing to indicate that manager was not a reliable person when he was recruited.

E [123] In *Melewar Apex Sdn Bhd* case (*supra*) this was considered at p. 588 B that:

F [37] There is no evidence adduced that the Plaintiff knew the Finance Manager was unreliable or had a bad record, or that the recruitment was so negligently conducted that the reliability of the Finance Manager was not addressed, and that these were the factors that contributed to the forgery or the making of the unauthorized signature by the Finance Manager.

G [124] The court would similarly find that from the evidence adduced that the plaintiff cannot be faulted or negligent for employing the manager to run their Bintulu office and to trust and rely on him.

H **The Plaintiff's Control System**

I [125] The plaintiff through PW1, PW2 and PW6 had established that the plaintiff had a control system for the monitoring the cheques and the bank statement of account. The court is satisfied that in the cross-examination of these witnesses in particular PW6 (the account executive)

that the defendant has not established that there has been any negligence on the part of the plaintiff in the conduct of the monitoring or operation of the manager and the account operations through the control system. The “part time” employment of PW6 in the mind of the court does not have any bearing on negligence, since all authorised cheques were properly checked, it was the use of unauthorised cheques and the fabricated statements which outwitted the plaintiff’s control system.

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[126] On the facts before the court, the manager in fact was able to acquire extra and unauthorised cheque books by the tampering of the cheque book request slips. If the defendant had adhered to the mandate and rules for signing on amendments then the availability of the extra and unauthorised cheque books would not have happened. It is this breach and failure on the defendant’s part that had allowed the manager to have access to the eight unauthorised cheque books to issue the forged cheques.

C

[127] The genuine bank statements from the defendant were sent to the Bintulu office being its registered office where the plaintiff’s documents would be sent and kept as a matter of course. The court will find that this normal practice and for which no negligence is attributable to the plaintiff in not requiring the bank statements to be sent to KL office.

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[128] The manager was able to exploit this flaw in the control system by not sending the received genuine bank statements to the KL office of the plaintiff. He had instead substituted them with fabricated duplicate statements which omitted the details of the drawdown of the forged cheques. In KL PW6 would be monitoring the movement of cheques based on the issue of the cheques known to them which would tally with the fabricated statements received and not detect any errors.

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[129] In fact the scheme of the third and unauthorised cheque books coupled with the use of fabricated statement of accounts are proof that the manager knew that this was the only way to successfully carry out the fraudulent transactions without alerting the plaintiff.

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[130] The court finds that the plaintiff not having been put on notice of this flaw cannot be faulted as having knowingly and been negligent in not detecting this flaw in their control system. There was nothing to warn them that the manager was sending them fabricated bank statements until December 2005 when this was discovered and stopped.

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A Duty To Check Bank Statements

B [131] Learned counsel for the defendant had submitted that based on para. 2.13.2 of the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3), the plaintiff was required to check its statements and immediately report any errors found therein. If there is no objection or complaint received within 14 days from the date of the statement, the balance and transactions stated therein will be deemed as accurate. These said terms and conditions were accepted by the plaintiff when it signed the application form (exh. DBOD1-(1-8)) to open their current account with the defendant.

C [132] Learned counsel for the plaintiff referred to the case of *Malayan Testing Laboratory Sdn Bhd (supra)* where Mohd Amin Firdaus JC had stated (at para. 70 p. 322) that the general accepted view that no duty is cast upon the customer to examine his pass-book and bank statements.

D [133] The court considers this duty may be created through contract. In *Tai Hing Cotton Mill Ltd* case where clauses similar to para. 2.13.2 of the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3) were relied on to disclaim liability by the respondent bank. The Privy Council held that though such statement accuracy clauses:

E are contractual in effect, but in no case do they constitute what has come to be called 'conclusive evidence clauses'. Their terms are not such as to bring home to the customer either 'the intended importance of the inspection he is being expressly or impliedly invited to make' or that they are intended to have conclusive effect against him if he raises no query, or fails to raise a query in time, on his bank statements. If banks wish to impose on their customers an express obligation to examine their monthly statements and to make statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the obligation and the sanction imposed must be brought home to the customer. ... Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation on the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.

F [134] On the authority of the *Tai Hing Cotton Mill Ltd* case, the court would firstly construe on the wording of para. 2.13.2 of the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3) as insufficient to be a 'conclusive evidence clause'. On this the court would refer to what my learned brother David Wong Dak Wah J' had held in paras. 35 to 37 of *Chairman, Sarawak Housing Developers'*

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Association v. Malayan Banking Bhd [2010] 10 CLJ 56). Secondly, on the evidence adduced it has also not been shown by the defendant that the burden of the obligation and the sanction imposed was brought home to the plaintiff. Like all public exemption clauses in a standard terms and conditions document like exh. DSBOD-2-3, a customer would not be bound if he was never specifically forewarned of its effect. Again the court would refer to what David Wong Dak Wah J had decided in paras. 38-42 of the case of *Chairman, Sarawak Housing Developers' Association (supra)*. A B

[135] The afore-cited authorities lays out the common law position of the duties of a banker and customer to each other and in contract on how to treat 2.13.2 of the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3). C

[136] Learned counsel for the defendant had submitted that after s. 73A BEA, a new approach had been taken as can be seen in the *Public Bank Bhd* case (*supra*) where Zaleha Zahari J stated: D

where there is an express provision for a customer to verify its accuracy within a specified period, *it is incumbent upon a customer to check their bank records and statement and draw the bank's attention to any errors or discrepancy*; ... It is a waste of paper and effect if the only obligation of a customer, so to speak, is simply to file such accounts away without taking the trouble to read them and check their accuracy. E

[137] Similarly in *RHB Bank v. L & R holdings Sdn Bhd & Anor* [2011] 4 CLJ 369 Jeffrey Tan JCA also adopted the same stand at p. 374E: F

Now had those banking statements been at all vetted by the 1st plaintiff, it should not seem possible that those "forged" telegraphic transfers could number 105 and/or could span two years. But given that the 1st plaintiff only reported the matter of the forged telegraphic transfers to the police on 21 March 2003, it must be seriously asked as to whether the 1st plaintiff had exercised any vigilance or had been negligent, which brings to focus the provisions of s. 73A Bills of Exchange Act 1949, ... (emphasis added) G

[138] The first issue for the court to decide is the effect of s. 73A BEA on the fundamental contractual relationship established by common law that the bank is only mandated to debit the account of the customer when that instruction is validly given in the form of a signature. It appears to the court on a reading s. 73A BEA that it has modified this to say that even if the instruction or signature is forged, the bank has authority now to act on the forged signature by the section H I

- A expressly providing that a forged signature will be deemed to be an authorised signature if the bank can show the customer was in default through knowledge or negligence.

- B [139] The next issue arising is whether by the wording of s. 73A BEA, the common law duty that a customer does not owe a duty to read bank statements has been abrogated? Can a banker who can now establish that the customer in not reading his bank statements has been negligent or in contractual breach to escape liability for the bank in not acting in accordance with the customer's mandate? Can this indirect and roundabout way without clear words of repeal be used to impose a duty
- C on the customer to read his bank statements thereby abrogating the consumer protection given to customers established and maintained over the years under common law? The above cited authorities had decided affirmatively that in common law it was never negligence not to read bank statements since no duty of care was owed in law and that any
- D contractual clause like para. 2.13.2 of the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3) will be construed strictly. Further the law was that a conclusive evidence clause was not effective if it had not been specifically brought to the attention of the customer. It would appear to this court that it will be bound by
- E the *RHB Bank* case (*supra*) to hold that a contractual duty to read bank statements will today on such failure amount to an act of negligence for the purposes of affording protection to banks under s. 73A BEA.

- F [140] Applying *RHB Bank* case (*supra*) to the facts here, the court would hold that para. 2.13.2 of the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3) cannot apply to the facts here simply because the plaintiff had shown compliance with it through the application of their control system. It was not the plaintiff's failure to check their bank statements and report errors within the 14 days that caused the loss. Rather it was their inability to get hold of the genuine
- G statements to check that had caused the non-reporting of errors through the fraud committed by the manager by his scheme of using forged checks which were omitted from the fabricated statements that were received, checked and tallied as correct by PW6 in KL.

- H [141] In other words a failure to check would be evidence of negligence or a breach as contemplated by para. 2.13.2 of the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3). The plaintiff had shown that PW6 did check *albeit* on the fabricated statements in accordance with the control system, as such the plaintiff had not been negligent or in breach of para. 2.13.2 of
- I the defendant's terms and conditions of operating a current account

(exh. DSBOD-2-3) in not spotting the issue of the forged cheques that would not be disclosed in the fabricated accounts received in their KL office.

[142] The court has found that the control system of the plaintiff could not be faulted because of the fraud committed by the manager and in turn the court will find that the purported exemption from liability that the defendant seek through application of para. 2.13.2 of the defendant's terms and conditions of operating a current account (exh. DSBOD-2-3) as not effective against the plaintiff's claim for reimbursement for the forged cheques since the plaintiff had a system of checking under their control system but were misled by the fabricated statements.

The Plaintiff's External Auditor

[143] Learned counsel for the plaintiff submitted that when DW1 had written to the external auditors of the plaintiff to obtain the defendant's bank confirmations for the financial years 2002 to 2005, they were unable to provide it and this was evidence that the external auditors had been lax and negligent in their external audit of the plaintiff's account, for if the audit had been properly conducted, the forgery would have been discovered earlier.

[144] The court finds that there is no evidence to show that the external auditor was not qualified or found to be incompetent at the time of appointment or that the plaintiff was reckless in appointing them. The plaintiff had discharged their duty as a company by appointing a qualified external auditor as required by law. Even if there was negligence found on the part of the external auditor in their failure to detect the manager's fraud, the external auditor's default being an independent contractor cannot be used by the defendant to claim that the plaintiff has been in the know or been negligent for the purposes of s. 73A of BEA.

[145] In *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409 James Foong FCJ had held:

[49] *As an employer is not responsible for any tort committed by an independent contractor in the course of the execution of the works* (which is the pleaded case of the 2nd defendant) unless there are evidence to indicate otherwise - see *Milligan v. Wedge* [1840] 12 A&E 737; *D & F Estates Ltd v. Church Commissioner of England* [1988] 3 WLR 368, and there being none in this case, the 2nd defendant cannot be held liable to the plaintiff for the negligence of the 1st defendant. (emphasis added).

- A [146] For s. 73A BEA to apply to the defendant, the external auditor must be shown to have warned the plaintiff of the defalcations in the plaintiff's bank account by the manager's fraud. Thereafter only on the plaintiff's failure to take remedial steps can this be construed as "knowingly or negligently contributes to the forgery or the making of the unauthorised signature". There is no such evidence adduced by the defendant to such effect.
- B

- C [147] The court finds that the evidence of the failure of the external auditor as an independent contractor whether by negligence or for whatever reason to detect the manager's fault cannot be attributable to the plaintiff as its failing to be raised to support the defence of the defendant under s. 73A BEA.

Court's Finding Under s. 73A

- D [148] The court finds that none of the above acts can be construed to have the effect that the plaintiff "knowingly or negligently contributes to the forgery or the making of the unauthorised signature" as to deem the forged signature to be authorised by the plaintiff and which in good faith the defendant can honour without liability even if forged.
- E [149] The court finds that the defendant has failed to establish that they have a defence under s. 73A of BEA against the plaintiff's claim for reimbursement of the forged cheques in the total sum of RM395,335.

Conclusion

- F [150] The plaintiff's claim is allowed in the sum of RM395,335 with interests at 4% per annum as from 28 August 2006 (date of last forged cheque) until full settlement and costs to be taxed unless agreed.

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